STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2003
v	No. 243637 Kent County Circuit
ROBERT LEE JACKSON, Defendant-Appellant.	LC No. 02-000106-FC

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant Robert Lee Jackson appeals as of right from the trial court's order sentencing him to 140 to 240 months' imprisonment for first degree home invasion, MCL 750.110a(2), and 80 to 120 months' imprisonment for assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant claims that the trial court erred by refusing to give the jury instructions on aggravated assault and misdemeanor entry without permission. We affirm.

Jury instructions must be viewed as a whole to determine if there was error. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994), citing *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). The ultimate goal is to fairly present the issues and sufficiently protect the defendant's rights, so if the instructions are imperfect, there is no error as long as both goals were accomplished. *Id.*, citing *Caulley*, *supra* at 184 and *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). "The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Id.*, citing *Caulley*, *supra* at 184.

The rules governing criminal jury instructions on lesser offenses turn on whether the lesser offense is a necessarily included lesser offense or a cognate lesser offense. An offense is a necessarily included lesser offense when the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser offense. *People v Cornell*, 466 Mich 335,

357; 646 NW2d 127 (2002).[1] In other words, the necessarily included lesser offense must be committed as part of the greater offense, so that it would be impossible to commit the greater without first committing the lesser. *People v Bearss*, 463 Mich 623, 627, 628; 646 NW2d 127 (2002).

A trial court is required to give a jury instruction where the requested instruction is on a necessarily included lesser offense and a rational view of the evidence would support it. *Cornell*, *supra* at 357. Further, where the trial court fails to instruct regarding a necessarily lesser included offense, it commits error requiring reversal if the evidence presented "clearly" supported the requested instruction. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002), citing *Cornell*, *supra*. "An offense is 'clearly' supported when there is substantial evidence to support the requested lesser instruction." *Id.*

But instructions on cognate lesser offenses are not permitted. *Cornell*, *supra*, 466 Mich at 355. A cognate lesser offense is a related offense, but it differs from a necessarily included lesser offense in that – in addition to it being of the "same class or category" – it includes one or more elements that are not included in the greater offense. *Cornell* overruled prior case law that permitted a court to instruct on cognate lesser offenses where the evidence supported a conviction of the cognate lesser offense. See, e.g., *People v Lemons*, 454 Mich 234; 562 NW2d 447 (1997).

Aggravated assault is a cognate lesser offense of assault with intent to murder, the crime with which defendant was charged. *People v Brown*, 87 Mich App 612, 615; 274 NW2d 854 (1978). Thus, the trial court was not permitted to give the instruction, *Cornell*, *supra*, 466 Mich at 355, and defendant's argument that the trial court should have honored his request it is without merit.

MCL 750.110a(2) sets forth the elements of first degree home invasion as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling. [*Id.*]

[1] Because this case was pending on appeal when *Cornell* was decided, and defendant preserved the issue by requesting particular instructions and objecting to the trial court's denial of his request, *Cornell* applies here. See *Cornell*, *supra* at 367.

MCL 750.115(1) defines the lesser crime of entry without permission as follows: "Any person who breaks and enters or enters without breaking, any dwelling, house, . . . without first obtaining permission to enter from the owner or occupant, agent, or person having immediate control thereof, is guilty of a misdemeanor." *Id.* Entry without permission is a necessarily lesser included offense of first degree home invasion. *Silver, supra* at 392. "It is impossible to commit the first-degree home invasion without first committing a breaking and entering without permission. The two crimes are distinguished by the intent to commit 'a felony, larceny, or assault,' once in the dwelling." *Id.*

Thus, we must first determine whether a rational view of the evidence supported an instruction on the lesser crime. *Cornell*, *supra*, 466 Mich at 358. If it did, then we must examine whether the error requires reversal by determining whether the evidence at trial "clearly" supported the requested instruction. *Id.* at 365-366.

To find that the trial court erred in not giving the instruction, this Court must find that a rational view of the evidence supported that defendant did not have the intent to commit a felony, larceny, or assault once in the complainant's home. We conclude that regardless whether the evidence rationally supported defendant's claim, there was not *substantial* evidence to support the instruction, so any error that may have occurred was harmless.

The evidence did not clearly support lack of intent to commit a crime for several reasons. For instance, defendant testified that he told the victim, his ex-girlfriend, that he was coming back over to her home after already having been told to leave by the police and threatened with a trespass charge. The victim testified that he did not tell her that and that she barred the door with a safety device. When defendant had trouble opening the door, he broke through it instead of knocking and waiting for the victim to answer. One of the broken doorknobs was found in the bedroom, supporting the victim's testimony that defendant rushed at her. Both defendant and the victim testified that she had the phone in her hand, which she probably would not have if she was expecting defendant.

Additionally, only the back bedroom light was on, which would be consistent with the victim's story, not defendant's. Phone cords were ripped out from the wall. Defendant said the victim was wearing a t-shirt, but she was discovered with only underwear and a bra on. The responding officer testified that he saw defendant pressing the victim against the wall in a choke-hold, and there was a significant amount of blood on that wall, which would negate defendant's story that he was helping her dress to take her to the hospital after an accidental injury.

Most importantly, there is no basis on which to believe that not giving the instruction affected the jury's verdict. Because the jury found defendant guilty of assault with intent to do great bodily harm, it did not believe his account that the victim was accidentally injured in an impromptu struggle. And clearly the jury did not believe that an assault did not occur once defendant was within the home. Thus, as defendant himself points out, there is not a "forceful case" that the jury would have believed that defendant entered the premises with benign intent.

Therefore, even if a rational view of the evidence supported defendant's claim that he had no felonious intent when he entered the apartment, the trial court's alleged error is harmless because the evidence did not "clearly support" defendant's claim. Therefore, we find no error requiring reversal.

Affirmed.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello